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No. 03-287

In The Supreme Court Of The United States

REGINALD WILKINSON, Director, *et al.*,
Petitioners,

v.

WILLIAM DWIGHT DOTSON, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED

Heck v. Humphrey, 512 U.S. 477 (1994), holds that a prisoner cannot advance a claim under 42 U.S.C. § 1983 that would "necessarily imply the invalidity" of a conviction or sentencing decision. *Id.* at 487. This is *Heck*'s so-called "favorable termination requirement."

These incarcerated Respondents brought § 1983 actions seeking to compel immediate rehearing of Parole Board decisions under which they will serve specified terms of incarceration, until 2005 and 2009 respectively, before they are again considered for release. That raises the following questions:

1. When a prisoner invokes § 1983 to challenge parole proceedings, does *Heck* bar those claims where success by the prisoner on the merits would result only in a new parole hearing and not necessarily guarantee earlier release from prison?

2. Does a federal court judgment ordering a new parole hearing "necessarily imply the invalidity of" the decision at the previous parole hearing for purposes of *Heck v. Humphrey*?

LIST OF PARTIES

The Petitioners are Ohio prison officials:

Reginald Wilkinson, the Director of the Ohio Department of Rehabilitation and Correction ("ODRC").

Margarette Ghee, the former chair of the Ohio Parole Board.

The Respondents are two prisoners in the custody of ODRC:

William D. Dotson
Rogerico J. Johnson

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OPINIONS BELOW

This case arises from two separate cases that were consolidated for *en banc* review, *Dotson v. Wilkinson* and *Johnson v. Ghee*.

The district court decision in *Dotson* was captioned as *Dotson v. Wilkinson*, Case No. 3:00 CV-7303 (N.D. Ohio, Aug. 7, 2000). It is reproduced at Pet. App. 47a-51a. The panel decision from the court of appeals was reported as *Dotson v. Wilkinson*, 300 F.3d 661 (6th Cir. 2002). It is reproduced at Pet. App. 36a-46a. The Sixth Circuit's *en banc* decision is reported as *Dotson v. Wilkinson*, 329 F.3d 463 (6th Cir. 2003). That decision is reproduced at App. 4a-35a.

The district court decision in *Johnson* is captioned as *Johnson v. Ghee*, Case No. 4:00 CV 1075 (N.D. Ohio, July 16, 2000). It is reproduced at Pet. App. 52a-56a. The Sixth Circuit did not issue a panel opinion. Instead, it consolidated *Johnson* with *Dotson* for *en banc* disposition. Accordingly, the Sixth Circuit decision in *Johnson* is also reported as *Dotson v. Wilkinson*, 329 F.3d 463 (6th Cir. 2003). As noted above, that decision is reproduced at Pet. App. 4a-35a.

JURISDICTIONAL STATEMENT

The Sixth Circuit entered the final judgment below on May 19, 2003. Petitioners filed the petition seeking certiorari on August 18, 2003, and the Court granted certiorari on March 22, 2004. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves two sets of federal statutes. The first is 42 U.S.C. § 1983, which states in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . .

The other relevant statutes are the federal habeas corpus laws, 28 U.S.C. §§ 2241 through 2254. They are reproduced in the Appendix to the Petition for Certiorari ("Pet. App.") at 57a, *et seq.*

Several provisions of Ohio law are also involved in this case. They are Ohio Rev. Code Ann. §§ 2967.03, 2967.12, 2927.13 (Anderson 1994); Ohio Admin. Code §§ 5120:1-1-07 (1975 and 1997), 5120:1-1-08 (1981), 5120:1-1-09 (1981); 5120:1-1-10 (1979) and (1988), 5120:1-1-11 (1979), 5120:1-1-20 (1998) and ODRC Policies 501-36 (1994) and 501-38 (1994). Those individual provisions are reproduced in either the Joint Appendix ("J.A.") or the Supplement to this brief ("Supp.")

INTRODUCTION

This case asks the Court to reaffirm the line separating those claims that state prisoners may advance under § 1983 from those they may not, this time in the context of parole decisions. The Court's precedent on this issue establishes one straightforward proposition—a prisoner cannot use § 1983 as a vehicle to mount a collateral attack that would "necessarily imply the invalidity of" state court convictions or sentences. See, *e.g.*, *Heck v. Humphrey*, 512 U.S. 477, 487 (1994). And *Edwards v. Balisok*, 520 U.S. 641 (1997), confirms both that (1) administrative decisions that affect the duration of a prisoner's confinement (there, decisions regarding good-time credits) count as "sentences," and (2) a federal decision that would "necessarily imply" that a State must vacate a prior hearing and provide the prisoner a re-hearing counts as "invalidation."

The result in this case, then, should have been a straightforward dismissal of the Respondents' § 1983 claims. Johnson and Dotson both advance claims that, if successful, would mandate that Ohio vacate parole decisions impacting the duration of their confinement, and both seek an order requiring an immediate new hearing at which they would be eligible for release. As such, *Heck* and its progeny bar their claims. The court below reached a contrary result because it adopted a narrow understanding of "invalidate" that limits that term to those federal decisions that will "inevitably or automatically result in earlier release." *Dotson v. Wilkinson*, 329 F.3d 463, 471 (6th Cir. 2003), Pet. App. 17a.

The lower court's result directly conflicts with the language and spirit of this Court's precedents, which establish that it is the implication of the federal judgment *for the state decision* that determines "invalidation," not the immediate impact on the prisoner's confinement. Indeed, if

anything, this case is easier than *Balisok*, for there, the prisoner sought only declaratory relief, money damages, and injunctions regarding future hearings; whereas here, each Respondent seeks an order requiring the State to ignore its past sentencing decision and provide him an immediate new hearing.

The court below erred on another level as well. *Heck*'s bar reprises and extends the holding in *Preiser v. Rodriguez*, 411 U.S. 475 (1973). Under that rule, habeas is the *exclusive* vehicle for those prisoner claims that fall within the "core of habeas." *Preiser*, 411 U.S. at 489. For such claims, the specific provisions of habeas supplant the more general remedy provided under the broad language of § 1983. The claims advanced here—which challenge parole hearings and seek immediate new hearings at which parole may be granted—fall within habeas's core. Accordingly, under settled law from *Preiser* forward, Respondents must advance their claims via habeas.

The lower court's refusal to give appropriate breadth to *Heck*, *Balisok* and *Preiser* undercuts the comity concerns animating those decisions. A recurrent theme in this Court's jurisprudence on prisoner claims is the need to respect state decision-making processes and to offer States the first opportunity to correct any constitutional errors that occur. The state court exhaustion requirement in federal habeas, a requirement § 1983 lacks, serves those objectives. The decision below, which throws open § 1983 to a new class of claims, by contrast, undercuts comity and federalism. Accordingly, the Court should reverse the decision below, and it should hold that Johnson and Dotson may not advance their claims under § 1983.

STATEMENT OF THE CASE

Two sets of facts are relevant to this case: the nature of the parole system resulting in the decisions challenged here, and the course of proceedings below.

A. Ohio's parole system

1. Eligibility and release standards

Ohio employs an indeterminate sentencing system for most crimes committed before July 1, 1996.[1] Under that system, the court sets the minimum and maximum term of the sentence. The Ohio Parole Board, a unit of the executive-branch Adult Parole Authority ("APA"), then determines whether the inmate will be released before the maximum sentence and, if so, when release will occur. *Woods v. Telb*, 89 Ohio St. 3d 504, 511-12, 733 N.E.2d 1103 (2000).

To be released, a prisoner must first become "eligible" for parole. He then has a hearing (the "release hearing"), at which the hearing officers determine whether he is "suitable" for parole (*i.e.*, whether he should be released). The process for determining eligibility, conducting the release hearing, and making the suitability determination (*i.e.*, the release decision) is controlled by (1) statute, (2) administrative

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[1] Ohio's sentencing laws were extensively amended in 1996, eliminating both indeterminate sentences and parole. Sentences for those like Respondents, however, who were convicted of crimes committed before July 1, 1996, continue to be controlled by pre-1996 law. *State ex rel. Lemmon v. Ohio Adult Parole Authority*, 78 Ohio St. 3d 186, 677 N.E.2d 347 (1997). All references to the Ohio Revised Code are to the Code as it existed on June 30, 1996, which continues to control Respondents' cases. Ohio Rev. Code Ann. § 2967.021(A) (Anderson 1996). The Code provisions reproduced in the Supplement (bound with this Brief) are also the 1996 versions.

regulations with the force of law, *Lyden Co. v. Tracy*, 76 Ohio St. 3d 66, 69, 666 N.E.2d 556 (1996), and (3) non-binding Parole Board guidelines.

A prisoner's initial parole eligibility date is set by statute. Ohio Rev. Code Ann. § 2967.13(A), (B) (Anderson 1994), Supp. 2. It is generally after the prisoner has served two-thirds of his minimum sentence, or after 15 years if he is serving a life sentence. *Id.*

Once the prisoner reaches his initial eligibility date, he receives a release hearing. The statutory standard for release is broad. It authorizes parole if the APA determines it "would further the interests of justice and be consistent with the welfare and security of society." Ohio Rev. Code Ann. § 2967.03 (Anderson 1994), Supp. 1. Regulations identify situations in which the Parole Board *must* decline parole, such as when there is a substantial reason to believe that the inmate will reoffend. See Ohio Admin. Code § 5120:1-1-07(A) (1975) J.A. 21; *id.*, (1997 version), Supp. 2-3. But it is well settled that the Parole Board *can* deny release "for any constitutionally permissible reason or for no reason at all." *Inmates of Orient Correctional Inst. v. Ohio State Adult Parole Auth.*, 929 F.2d 233, 236 (6th Cir. 1991).

In addition to the statutes and regulations, the Parole Board relies on internal guidelines to assist it in making the release decision. In 1998, the Parole Board replaced its earlier guidelines with new guidelines (the "1998 Guidelines") that use a two-factor grid system. The first is the likelihood that the inmate will reoffend. The second is the severity of the crime that led to the incarceration. Dotson Complaint ¶ 6 and Ex. D, J.A. 14, 27.[2] The intersection of

[2] Dotson's complaint sets forth the matrix itself, but does not capture the detail involved. The full guidelines included 101 pages of detailed rules to establish procedures for analyzing the risk of reoffense and the severity of a prisoner's crime. Ohio's parole guidelines can be accessed online at this site: http://www.drc.state.oh.us/web/Guideline%20Manual04.pdf (last visited July 15, 2004).

those factors on the grid yields a suggested range of months that the inmate should serve before being released.

Although the Parole Board is free to depart from those non-binding guidelines, *State ex rel. Vaughn v. Ohio Adult Parole Auth.*, 85 Ohio St. 3d 378, 379, 708 N.E.2d 720 (1999), it usually follows them. As a result, inmates convicted of more serious crimes generally serve longer periods of incarceration under the 1998 Guidelines than they did under the prior guidelines.

2. Release hearings and decisions

Two types of parole decisions are at issue here: those made at release hearings and those made at so-called "halfway reviews." At release hearings, parole officials make decisions that impact a prisoner's sentence in two distinct ways. First, the parole official determines whether the prisoner should be released. Second, if the official denies parole, she sets the date of the next release hearing. Prisoners cannot be released in Ohio except through release hearings, Ohio Admin. Code § 5120:1-1-11(A) (1976), Supp. 5, so this has the effect of guaranteeing that the prisoner's incarceration will continue at least until that next hearing.

Parole Board policies govern the manner in which the release hearings are conducted. Before the hearing itself, parole officials must conduct a thorough pre-hearing review of the inmate's prison and parole files, ODRC Policy 501-36

§ VI(B)(3) (1994),[3] Supp. 11, and collect information about the prisoner from a variety of third-party sources, including the crime victim. Ohio Rev. Code Ann. 2967.12 (A) and (B), Supp. 1-2; ODRC Policy 501-38 § VI (1994), Supp. 17. The inmate receives two weeks' notice of the hearing. He is allowed to submit written information, and to appear and respond, both orally and in writing, to any information presented. ODRC Policy 501-36 § VI(A)(3), Supp. 10.

Regulations provide that the case is heard before either a hearing officer or a panel consisting of a hearing officer and one of the nine members of Ohio's Parole Board. *Id.* at §§ IV(A) and (B), VI(C)(4), (5), Supp. 8, 9, 12. The hearing covers several matters, including the details of the inmate's crime, the relative role of any codefendants in his case, the inmate's criminal and prison records, and the Parole Guidelines. *Id.* at § VI(C)(5), Supp. 12.

The officers then make the release decision. In deciding, they must consider all of the information collected through the hearing. Ohio Admin. Code §§ 5120:1-1-09 (1981), J.A. 23; 5120:1-1-07 (B) (1997), Supp. 3. See also

[3] Petitioners recognize that ODRC Policy 501-36 and several other administrative regulations, policies, and court decisions cited in this portion of our brief were not in the trial court records. However, appellate courts may consider judicially noticeable government documents not advanced below. R. Stern, E. Grossman, S. Shapiro & K. Geller, *Supreme Court Practice*, § 13.11(k)(1) (8th Ed. 2002). This Court has consistently taken judicial notice of such materials. *Thornton v. United States*, 271 U.S. 414, 420 (1926) (regulations); *Bowles v. United States*, 319 U.S. 33, 35 (1943) (decision); *Caha v. United States*, 152 U.S. 211, 221-222 (1894) (agency rules). All references to regulations and policies are to their form at the time of the parole decisions Respondents challenge here. Some of the regulations and policies cited have since been renumbered or otherwise reorganized, but all the procedures described in the text were required at the time of the decisions challenged here.

Ohio Admin. Code §§ 5120:1-1-08 (1981), J.A. 22; 5120:1-1-07 (C) (1997), Supp. 4-5 (listing other factors the hearing officer may consider). The officers then evaluate the case under the parole guidelines. ORDC Policy 501-36 § VI (C)(9), (D)(1)(c), Supp. 13, 14. The presiding official assesses each of the relevant factors (*i.e.*, the severity of crime and likelihood of reoffending). She then uses those factors to determine the suggested time of incarceration under the Parole Guidelines. Officials are free to ignore that suggestion, but they typically follow it.

The parole officials prepare a written decision that addresses two primary issues. First, the decision addresses whether the inmate should be released. Second, for those prisoners denied parole, the hearing officer sets the date at which the inmate will next receive a parole hearing. Inmates who are denied parole must also receive an explanation for the decision. *Id.* at § VI (D)(5), Supp. 15.

An inmate cannot be released without a formal hearing. Ohio Admin. Code § 5120:1-1-11(A) (1976), Supp. 5. Therefore, a decision setting the next parole hearing on a particular future date essentially precludes release before that later hearing date.[4]

3. Halfway reviews

Ohio regulations also provide, in some cases, for a "halfway review." In all cases in which the decision from the release hearing sets the next release hearing more than 20 months away, the inmate's file is reviewed no later than

[4] The only exception to this, as described in the next section, is when the release hearing is moved up as a result of a halfway review. But, even then, the deferral decision guarantees incarceration at least through that halfway review.

halfway through the deferral period. Ohio Admin. Code § 5120:1-1-20 (A), Supp. 5-6. (In April 1998, newer regulationa abolished halfway reviews for release decisions made after that date.)

At the halfway review, a hearing officer conducts a complete review of the inmate's parole and prison files to determine whether to move the prisoner's next release hearing up from its previously scheduled time. *Id.* at § (B), Supp. 6. The review focuses on the factors traditionally considered at a sentencing proceeding. These include the details of the inmate's crime, his prior criminal record, the problem areas underlying his criminal activity, and what programming he has pursued to address those problems. *Id.* at § (D), Supp. 6. The inmate receives notice and is allowed to submit written materials. *Id.* at § (C), Supp. 6.

Based on her review, the hearing officer recommends to the chair of the Parole Board whether or not to move up the next scheduled release hearing. The inmate may also respond to that recommendation. *Id.* at §§ (H), (I), Supp. 7-8. The chair then decides whether to advance the hearing. If not, the inmate is not considered for release until the hearing date set at his previous release hearing, and thus has no possibility of release until that time. Ohio Admin. Code § 5120:1-1-11(A), Supp. 5.

4. Ohio judicial remedies available to contest parole release decisions

Inmates have two ways to contest adverse parole release decisions in Ohio's courts. The first and broadest is declaratory judgment. "A declaratory judgment action is the proper remedy to determine the constitutionality or constitutional application of the parole-guidelines." *Hattie v. Anderson*, 68 Ohio St. 3d 232, 235, 626 N.E.2d 67 (1994).

Ohio's courts have also granted significant relief on non-constitutional grounds through such actions. *Layne v. Ohio Adult Parole Auth.*, 97 Ohio St. 3d 456, 780 N.E 2d 548 (2002). The second remedy is mandamus, which can be used in limited circumstances. *Hattie*, 68 Ohio St.3d at 234.

B. The proceedings below

This case arises from two separate cases, one by Respondent Dotson and one by Respondent Johnson, that were consolidated for *en banc* consideration.

1. Dotson's claims and the district court's decision

An Ohio jury convicted Dotson of aggravated murder in 1981. He is currently serving a life sentence. Under Ohio law, he first became eligible for parole in 1995, and he had a release hearing at that time.[5] Dotson Complaint ¶¶ 1-3, 11, 12, J.A. 12, 16.

The Parole Board declined to parole Dotson. Additionally, due to the seriousness of his crime, the Board determined that Dotson should not receive a new release hearing until he had served ten more years. Accordingly, the Board set his next release hearing for June 2005. Dotson Complaint ¶ 12, J.A. 16.

Dotson received a halfway review in 2000, five years after the 1995 decision. Dotson Complaint ¶ 13, J.A. 16-17. The hearing officer analyzed the matters usually considered

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[5] Both district courts *sua sponte* dismissed Respondents' cases pursuant to 28 U.S.C. § 1915(e) for failure to state claims, before defendants moved or answered. Thus, the facts regarding Respondents' claims come exclusively from their respective complaints.

at such proceedings, as discussed above, under the 1998 Guidelines. He concluded that, under those Guidelines, Dotson was unlikely to be released until he had served 32.5 years (*i.e.*, until 2013). He thus determined that there was no reason to advance the 2005 hearing date, which had been set at the 1995 hearing, and that recommendation was apparently accepted. Dotson Complaint ¶¶ 13-16 and Ex. G, J.A. 16-17, 37.

Dotson did not seek administrative reconsideration or relief in Ohio's state courts. He instead brought this suit in federal court under 42 U.S.C. § 1983. His complaint, while not perfectly clear, appears to advance two ex post facto claims based on the use of the 1998 Guidelines at his halfway review. First, he contends that under the pre-1998 Guidelines, the halfway review could possibly have resulted in parole officials moving his next release hearing up from 2005, as he had already served the recommended 15 years before parole release. Because under the 1998 Guidelines his minimum recommended term was 390 months, however, the parole official concluded that there was no purpose in moving his hearing forward. Dotson Complaint ¶¶ 14-16, J.A. 17. Thus, he contends, use of the 1998 Guidelines unconstitutionally deprived him of an earlier release hearing. Second, Dotson challenged, also on ex post facto grounds, the parole officer's statement that the 1998 Guidelines would apply at his previously scheduled 2005 hearing. Complaint ¶¶ 1-4, J.A. 17-19.

Dotson sought both declaratory and injunctive relief. In particular, he wanted a declaration regarding his right to have the substantive parole standards and scheduling regulations in effect at the time of his conviction applied in his case, and an injunction ordering a "prompt and immediate parole hearing," using those standards. Dotson Complaint, J.A. 20. That is, he essentially wanted: (1) an immediate new release

hearing, thereby undoing the scheduling decision made at the 2000 halfway review, and (2) an order requiring the Parole Board to use the Guidelines and the scheduling regulations in effect at the time of his conviction in conducting any future release hearings.

The district court screened Dotson's case under 28 U.S.C. § 1915(e). It found that *Heck* barred Dotson's § 1983 claims because success on his claims would necessarily imply the invalidity of a prior parole decision. Pet. App. 47a-50a.

2. Johnson's claims and the district court's decision

Johnson is serving three indefinite sentences: one for aggravated robbery, one for various offenses related to his attempt to grab an officer's gun at a hearing contesting the robbery conviction, and one for assaulting a prison guard. *State v. Johnson*, No. 12687, 1992 Ohio App. Lexis 116 (Montgomery Co. App. May 16, 1992); *State v. Johnson*, No. 11743, 1992 Ohio App. Lexis 133 (Montgomery Co. App. Jan. 17, 1992); *State v. Johnson*, No. 98CR065 (Scioto Co. C.P. Feb. 26, 1998). Johnson Complaint, J.A. 43, 45; Affidavit, J.A. 55-56.

Johnson had his initial parole hearing in April 1999. The outcome of that hearing was a decision (1) denying Johnson release, and (2) setting his next release hearing for 2009 (*i.e.*, ten years away).

Johnson then brought a § 1983 action, in which he alleged that the hearing violated his rights under the Ex Post Facto Clause in two ways. First, he objected that parole officials relied on the 1998 Guidelines, as he contends that the pre-1998 Guidelines should apply because his crimes

were committed before 1998. Second, he claimed that the Parole Board's decision to set his second release hearing for ten years away was improper, because that period was longer than the five years authorized by regulations in effect at the time of his conviction. He also claimed that the hearing violated the Due Process Clause in a variety of ways: the Parole Board allegedly conducted the hearing without the proper complement of parole officials, allegedly relied on false information in deciding his case and allegedly denied him the right to speak at the hearing. Johnson Complaint at unnumbered pp. 3-7, J.A. 42-53.

Although his initial complaint sought unspecified declaratory and injunctive relief, *id.* at 7, J.A.. 53, his briefing in the Sixth Circuit clarified that the relief he sought was a new parole hearing, at which he would be considered for immediate release. Appellant's Opening Brief at pp. 10, 15 ("A new . . . parole hearing is the relief Johnson seeks . . ."), 19-20 ("If successful, Johnson's § 1983 claim gets him a new parole hearing . . . .").

As with Dotson's claim, the district court screened Johnson's case pursuant to 28 U.S.C. § 1915(e) and dismissed it before service, concluding that his claims were *Heck*-barred. Pet. App. 52a-55a.

3. The Sixth Circuit's decisions

Both respondents filed timely *pro se* appeals under 28 U.S.C. § 1291. The State defendants waived briefing in *Dotson*, and the matter was submitted to a Sixth Circuit panel for decision. Meanwhile, the court of appeals appointed counsel in *Johnson*, and the appeal was fully briefed and argued before a separate panel.

While *Johnson* was pending, the *Dotson* panel issued a published decision reversing the district court's decision in that case. See *Dotson v. Wilkinson*, 300 F.3d 661 (6th Cir. 2002), Pet. App. 36a-46a. The panel held that *Heck* does not apply unless a prisoner's § 1983 claim would, if successful, "necessarily affect the duration of his confinement." The panel concluded that Dotson's claims did not fall into this category because, "even if successful, [they] will *not* demonstrate the invalidity of any outstanding criminal judgment against the plaintiff." *Id.* at 666, Pet App. 45a (quoting *Heck*, 512 U.S. at 487) (emphasis added by court of appeals).

The full Circuit then decided *sua sponte* to rehear *Dotson en banc*, together with Johnson's case and a third appeal involving the same issue. The *en banc* court reversed and reinstated Dotson's and Johnson's claims. *Dotson v. Wilkinson*, 329 F.3d 463 (6th Cir. 2003).[6]

In a 6-4 decision, the majority held that Respondents' claims were not *Heck*-barred for two reasons. The primary rationale was that a § 1983 claim "necessarily implies the invalidity of a prisoner's conviction or sentence" under *Heck only if* it "will inevitably or automatically result in an earlier release." *Dotson*, 329 F.3d at 471, Pet App. 17a. According to the majority, while the details of Dotson's and Johnson's claims varied, their claims were the same in one key respect—each prisoner would gain only a new *hearing* if successful. Neither would inevitably receive immediate or

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[6] In a separate opinion, an equally-divided court affirmed the dismissal of a prisoner's claim in the third case. See *Goodwin v. Ghee*, 330 F.3d 446 (6th Cir. 2003).

speedier release, because the outcomes of the new hearings would be uncertain. The majority therefore concluded that the Respondents' claims were not *Heck*-barred.

Its second, and only partially developed, rationale was that Parole Board decisions are not the types of decisions protected by *Heck*. The majority stated, with little explanation, that the *Heck* rule "properly refers only to" claims implicating "the decision of a convicting court." 329 F.3d at 470, n.2, Pet. App. 35a.

The dissent reached opposite conclusions on both points. It rejected the threshold proposition that *Heck* protects only judicial decisions "because *Edwards* [*v. Balisok*] itself was dealing with the judgment of an administrative body" when it found the claim considered there *Heck*-barred. 329 F.3d at 474 (Gilman, J. dissenting), Pet. App. 24a.

The dissent also disputed the majority's analysis of what types of claims "necessarily imply the invalidity of a conviction or sentencing decision." It rejected the conclusion that a claim must result in earlier release to run afoul of *Heck*. The dissent instead focused on whether the claim would nullify a conviction or sentence, without regard to the effect of that nullification on the claimant's confinement. "In other words, it is the implied invalidity of the administrative hearing itself . . . that is an impermissible result of a § 1983 claim." *Id.* at 474, Pet App. 23a. The dissent found support for that approach in *Balisok*, which applied the *Heck* test to a claim that would result only in rehearing rather than in a guaranteed earlier release, *id.*, Pet. App. 24a, and applied that analysis to Johnson's claims. It concluded that those claims, which "ask[] that [a] hearing be 'redone,'" were "the very type of attack on an underlying sentence that *Heck* and *Edwards* expressly prohibit." *Id.* at 479, Pet. App. 34a.

SUMMARY OF ARGUMENT

The court below properly recognized that prisoners cannot use § 1983 to advance claims that "necessarily imply the invalidity" of otherwise binding state sentencing decisions. See *Heck*, 512 U.S. at 487. Application of that principle here should have been straightforward. As explained below, Respondents' § 1983 claims challenge extant state sentencing decisions, and success on their claims would render the decisions invalid by requiring the State to provide new parole hearings.

The court below, however, improperly held that, because success on the claims would result only in rehearing, rather than outright release, *Heck* did not control. According to the court, a decision "necessarily implies the invalidity" of a previous state sentencing decision only if it would "inevitably or automatically result in earlier release." 329 F.3d at 471, Pet. App. 179. And, because here the rehearings might again result in parole denials, that condition was not met.

Four reasons demonstrate why the "inevitable or automatic earlier release" standard is the incorrect dividing line for separating those prisoner claims that can be advanced under § 1983 from those that cannot. First, the Court's statements in *Heck* and *Balisok*, as well as the facts and results in those cases, make it plain that invalidation is measured by the implications of the federal claim *for the state decision*, not the implications for the prisoner's confinement. And, as the Court held in *Balisok*, an order that implies that a State must vacate a first decision and undertake a second hearing "implies the invalidity" of the first decision. Thus, as success on their claims would entitle Johnson and Dotson to rehearings and new parole decisions (to be sure, decisions that may again deny parole), they are seeking to

"invalidate" sentencing decisions and cannot proceed under § 1983. Indeed, this case is even easier than *Balisok*, as Respondents here request injunctive relief mandating re-hearings, relief that far more directly affects the state sentencing decisions than the relief Balisok sought.

Second, the *Heck* bar is simply a broader statement of the rule from *Preiser*—that prisoners asserting claims that fall within the core of habeas must rely on the habeas statutes as their exclusive federal remedy. This rule recognizes that, where a claim falls within the literal text of both § 1983 and the habeas statutes, Congress intended the more specific language of the latter to supersede the broader provisions of the former. Respondents' claims here seek a new hearing at which they might obtain immediate or speedier release. As such, they fit comfortably within the traditional core of habeas. Accordingly, under *Heck*'s implementation of *Preiser*, Dotson and Johnson must use habeas, rather than § 1983, to pursue these claims.

Third, none of the Court's § 1983 precedents support the availability of § 1983 for claims such as these. At most, some cases addressed the merits of such claims under § 1983, but without examining whether that was an appropriate vehicle. The one § 1983 case to discuss the issue, *Wolff v. McDonnell*, 418 U.S. 539 (1974), properly understood, actually supports Petitioners, not Respondents. *Wolff* rejected the availability of § 1983 for claims, such as those here, that sought speedier release. And, to the extent that *Wolff* could be interpreted to support a broader scope for § 1983 that would cover Respondents' claims, that reading is foreclosed by the Court's later decisions in *Heck* and *Balisok*.

Finally, the straightforward reading of *Heck*, *Balisok*, and *Preiser* that we urge here is the only reading that is consistent with the comity concerns this Court has repeatedly

articulated as a motivating force in requiring prisoners to pursue habeas rather than § 1983. Channeling such cases to habeas would nudge the cases toward state court, where the state system may resolve them without drawing the federal judiciary into state parole decisions.

ARGUMENT

A. Under *Heck*, a prisoner may not use Section 1983 where, as here, a judgment in his favor would "necessarily imply the invalidity" of a state sentencing decision.

Simply put, *Heck* holds that a prisoner cannot use § 1983 to collaterally attack a state conviction or sentence, either directly or indirectly. That is, a prisoner cannot seek a federal judgment that *directly* overturns a state conviction—for example, an injunction vacating the conviction. And a prisoner cannot seek a federal judgment that *indirectly* does so—for example, a federal declaration that "the state conviction is sufficiently erroneous that we would have overturned it if only plaintiff had asked." *Heck* forbids either form of collateral attack, direct or indirect.[7] In *Heck*'s terms, if the federal judgment would "necessarily imply the invalidity" of the state conviction or sentence, it is irrelevant that the prisoner does not ask the federal court to deliver the ultimate *coup de grâce*. 512 U.S. at 487.

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[7] Some members of the Court have suggested that *Heck* will bar such claims only if another condition is also met—namely, that habeas corpus is available as a vehicle to raise the claim. See *Muhammad v. Close*, 124 S. Ct. 1303, 1305 n.2 (2004), citing *Spencer v. Kemna*, 523 U.S. 1, 21-22 (1997) (Ginsburg, J., concurring). As in *Muhammad*, "[t]his case is no occasion to settle the issue." 124 S. Ct. at 305 n.2. That is so because, even if a habeas requirement exists, it is plainly met. See pp. 34-36.

Respondents here seek to use § 1983 to attack a state sentencing decision. And the nature of their claims, as well as the relief they seek, shows that they are collaterally attacking that decision, both directly and indirectly. Accordingly, *Heck* bars them from using § 1983 to advance their claims.

1. Parole decisions like those Respondents challenge here are sentencing decisions.

The decisions under attack here—Parole Board decisions determining that the Respondents should serve specified periods of time in prison before again being considered for release—are sentencing decisions. Ohio law recognizes parole decisions as such, and this Court also understands parole in that manner.

Under Ohio law, sentencing authority is divided between the courts and the Adult Parole Authority ("APA"). After conviction, the courts set the minimum and maximum terms of any prison sentences. *Woods v. Telb*, 89 Ohio St. 3d 504, 511, 733 N.E. 2d 1103 (2000). "But . . . for as long as parole has existed in Ohio, the executive branch (the APA and its predecessors) has had absolute discretion over that portion of an offender's sentence" between those termini. *Id.* at 512. That approach is consistent with the law of most jurisdictions operating parole systems. "Indeterminate sentencing systems allocate sentencing discretion to the judge *and* the paroling authority." V. Palcios, *Go and Sin No More: Rationality in Release Decisions by Parole Boards*, 45 S.C.L. Rev. 567, 573, 574 (1994) (emphasis added). Thus, parole officials exercise sentencing discretion and make sentencing decisions.

Indeed, the Court has recognized as much. It has noted that the former federal sentencing system, which included a

parole component that was functionally indistinguishable from the system controlling Respondents' cases, was "a 'three-way sharing' of sentencing responsibility" where the legislature "defined the maximum, the judge imposed a sentence within the statutory range . . . and the Executive Branch's parole official eventually determined the actual duration of imprisonment." *Mistretta v. United States*, 488 U.S. 361, 364-365 (1988); see also *id.* at 365-366 and 390 ("[T]he sentencing function long has been a peculiarly shared responsibility among the Branches of Government."). More recently, in *Blakely v. Washington*, 72 U.S.L.W. 4546 (2004), the Court confirmed that parole boards exercise "sentencing discretion." *Id.* at 4550 ("a judge (like a parole board) may implicitly rule on those facts he deems important to the exercise of his sentencing discretion . . .").

These decisions do not lose their character as sentencing decisions just because administrative, rather than judicial, officials make them. Administrative officials also made the decisions at issue in *Balisok*. See *Balisok*, 520 U.S. at 643-45 (explaining administrative procedure regarding reduction of good-time credits). See also *Preiser*, 411 U.S. at 476, 491. There, as here, however, because the administrative decision affected the term of confinement, the Court easily concluded (1) that it counted as a "sentencing decision" for *Heck*'s purposes and (2) that *Heck* barred the use of § 1983 as a vehicle for challenging that decision. In short, it is the potential impact on the term of confinement (including the implied or declaratory impact, see below at 23-28), not the identity of the decision maker, that marks a sentencing decision.

The decisions in Ohio's parole process affect the term of confinement in two ways. The first way, of course, is that a favorable decision at a release hearing means an immediate release, thereby shortening the term of confinement.

Second, parole officials also make determinations, during parole release hearings and at halfway reviews, regarding the next possibility of release by the scheduling of later release hearings. These scheduling decisions reflect the exercise of sentencing discretion, and affect the duration of confinement, because a prisoner cannot obtain parole release except through a parole release hearing. Ohio Admin. Code § 5120:1-1-10(A), Supp. 5. Indeed, this defined impact on duration (*i.e.*, scheduling the next release hearing five years out means the prisoner will serve that time) makes these scheduling decisions even more like the sentencing decisions at issue in *Balisok* (which involved a set number of good-time days) than the release decision itself is. Accordingly, both types of decisions (*i.e.*, those granting or denying parole, and those scheduling future release hearings) constitute "sentencing decisions" for purposes of *Heck*'s bar.

Here, Respondents attack parole board decisions that are plainly sentencing decisions. Johnson attacks his April 9, 1999, parole release hearing, a hearing that denied him parole and set his next release hearing ten years away. That decision, of course, directly affected the duration of his confinement in both respects. It denied him what could have been an immediate release in 1999, and, by scheduling him for a 2009 hearing, it ensured that he will not achieve release before then.

Dotson's claims also seek, at least in part, to invalidate a sentencing decision. In particular, he attacks the parole officer's decision, at Dotson's 2000 halfway hearing, not to move up his currently scheduled 2005 release hearing. See Dotson Complaint ¶¶ 1-4, J.A. 17-19. That decision was an exercise of the officer's sentencing discretion, as he could have moved it up, which might have led to earlier release.

As with Johnson, in Dotson's case both aspects of earlier release were implicated—both the denial of immediate release and the fixed-time scheduling of the next opportunity for release. The scheduling aspect is obvious, as Dotson lost any chance of release between 2000 and 2005. The immediate-release denial is not as obvious, as a halfway review, unlike a full-fledged release-suitability hearing, does not technically allow for immediate release. However, a decision maker at a halfway review could schedule a full release hearing in the near-immediate future, *i.e.*, just a few weeks later, so the halfway hearing could lead to essentially an "immediate" release. Ohio Admin. Code § 5120:1-1-20(K) and (L), Supp. 8.

In sum, both Johnson and Dotson challenge sentencing decisions, and, as shown below, their challenges would imply the invalidity of the resulting sentences.

2. Equitable relief that vacates a parole decision and requires a rehearing necessarily implies the invalidity of the earlier decision, even if the relief would not automatically guarantee earlier release.

Heck's bar extends to all challenges that would, if successful, necessarily imply the invalidity of a sentencing decision. The court below erroneously concluded that "invalidation" would occur in the parole context only if success on the claim would "inevitably or automatically result in earlier release." See 329 F.3d at 471, Pet. App. 17a. That is, the court focused on the direct impact that success would have on the prisoner's confinement. This Court's precedent makes clear, however, that the proper focus is the impact of a federal judgment on the state decision itself. And

where success on the federal claim would require a State to ignore its previous decision and decide anew, that constitutes "invalidation."

a. "Invalidation" is measured by the implications for the state decision, not the prisoner's confinement.

Heck's holding does not make application of the favorable termination requirement contingent upon what would follow invalidation of the state decision. It simply addresses claims that "would render a conviction or sentence invalid," with no mention of the consequences of invalidity. 512 U.S. at 486. It therefore provides no textual support for the proposition that *Heck* is limited to claims where release (or any other particular result, for that matter) necessarily follows nullification of the state decision.

To the contrary, the language that *is* used in *Heck's* holding—the inquiry into whether the § 1983 claim would "render . . . invalid" or "invalidate" a state decision—indicates that the exclusive focus is on the nullification of the state decision itself, not on the later consequences. The leading dictionaries describe "invalid" as "not legally or officially acceptable," *Cambridge Advanced Learner's Dictionary* (2003); "not legally . . .valid," *American Heritage Dictionary of the English Language* (4th ed. 2000); and "void or without legal force," *Random House Dictionary of the English Language* (2d ed. 1987). Similarly, to "invalidate" is to "nullify." *Id.* None of those understandings go beyond the object nullified to describe its replacement. Given that, it is no surprise that this Court held that "the term 'invalidate' ordinarily means to render ineffective, *generally without providing a replacement rule or law*." *Humana, Inc. v. Forsyth*, 525 U.S. 299, 307 (1999) (emphasis added).

The decision below simply cannot be squared with that understanding of invalidity. This Court looks solely to the import of the potential federal judgment for the state decision. But the Sixth Circuit ignored the undisputed fact that success on Respondents' claims would necessarily imply that their prior parole decisions were nullities. And while *Heck* takes no notice of what follows invalidation, that was the sole focus of the lower court's determination. It plainly erred.

b. A complaint need not expressly seek the nullification of the state decision to imply the invalidity of that decision.

Balisok further teaches the irrelevance of the precise relief a prisoner seeks. It shows that *Heck* looks past the prayer for relief to consider what success on the merits in the federal action would portend for the state decision, even if the prisoner does not expressly ask the federal court to nullify that decision.

In *Balisok*, a prisoner sought to use § 1983 to challenge "the validity of the procedures used to deprive him of good-time credits." *Balisok*, 520 U.S. at 643-644. He did not ask for the credits to be restored, nor did he even ask for a new hearing to reconsider the deprivation; rather, he asked only for (1) a declaration as to the invalidity of the procedures, and (2) damages for "depriving him of good-time credits *without due process*, not for depriving him of good-time credits *undeservedly* as a substantive matter." *Id.* at 645 (emphases in original). The appeals court distinguished *Heck* on the idea that *Balisok* challenged merely the procedures employed, not the result of the hearing. *Id.* This Court, however, rejected that notion.

Amplifying *Heck*, in which the prisoner also avoided a direct challenge to the state decision, 512 U.S. at 479, the *Balisok* Court explained that the nature of the relief sought in a given case would not remove a claim from *Heck's* bar. Rather, the question was whether the nature of a prisoner's *claim* was such that any affirmation of the claim would imply that a state conviction or sentence was invalid. 520 U.S. at 645. That is, it did not matter whether the prisoner sought damages or even just a declaratory judgment; if a successful claim would amount to a federal declaration that the state decision was so error-ridden that it was the *type* that should not be allowed to stand, the claim was barred in § 1983. The *Balisok* Court concluded that the claims advanced there—the denial of an opportunity to present a defense, and a biased and deceitful decision maker—if successful, would mean that the state decision was per se invalid. *Id.* at 647-48. Thus, the claims were barred as implying invalidity, and the prisoner could not get around this bar merely by choosing a form of relief that would leave the targeted decision formally untouched.

The Sixth Circuit here did the opposite. Instead of focusing on whether the constitutional violations Respondents claimed would imply the parole decisions' invalidity, it looked only at the fact that the prisoners did not seek a 180-degree reversal (from denial to release). That exclusive focus on the relief sought cannot be reconciled with *Heck's* and *Balisok's* teachings on this point.

c. *Balisok* applied the *Heck* bar to claims that would entitle a prisoner only to a rehearing, not to a definite reversal of the first hearing's result.

Most importantly, the Court need not rely exclusively on dictionary definitions or *Heck's* and *Balisok's* instructions

about the insignificance of the relief sought to decide that these prisoner's claims will "invalidate" their parole decisions in spite of the fact that they seek rehearing instead of release. It has already held that a decision is "invalidated" not only when it is "reversed," but also when it is vacated for rehearing.

Balisok applied *Heck's* bar to a claim that would result in rehearing rather than outright reversal. The Court explained that the complaint made there, the alleged inability to present evidence, was the type that would entitle the prisoner to either reinstatement of the credits *or a new hearing*, saying that his impaired-defense claim "is an obvious procedural defect, and state and federal courts have reinstated good-time credits (*absent a new hearing*) when it is established." 520 U.S. at 647-48 (emphasis added). The "new hearing" option was further reinforced by the Court's citation, in support of its statement, to cases that forced States into the choice of reversing a decision's result or *giving a new hearing*. See *id.* So, for example, in *Kingsley v. Bureau of Prisons*, 937 F.2d 26, 27, 31 (2d Cir. 1991), a federal court had ordered a prison warden to reinstate a prisoner's good-time credits "unless a new hearing is held at which" the procedural defects were cured. And, in *Dumas v. State*, 654 So. 2d 48, 49 (Ala. Crim. App. 1994), another case that *Balisok* cited, the prisoner was "entitled to a new disciplinary hearing." Similarly, in *Mahers v. State*, 437 N.W.2d 565, 568-69, 570 (Iowa 1989), the court had ordered a rehearing while stressing that the new hearing might reach the same result. Turning from these precedents to *Balisok's* facts, the Court expressly noted that *Balisok* might well obtain the same results at a new hearing. 520 U.S. at 647-648. But that did not matter, and the Court nonetheless proceeded to apply the *Heck* bar to those claims.

Thus, *Balisok* shows that a federal decision necessarily implying the need for a new hearing falls within *Heck's* bar, even if it does not require a complete reversal of result at that new hearing. The decision below, which is premised on the fact that Respondents are entitled only to rehearing rather than reversal of their parole cases, cannot be squared with that and must yield.

d. Both the nature of Respondents' claims and the relief they seek demonstrate that their claims, if successful, would necessarily imply the invalidity of their previous parole decisions.

Applying the above principles to Respondents shows that their claims are *Heck*-barred. In particular, both the nature of their claims and the relief they request show that success on their claims would require the State to vacate the results of previous parole hearings and provide each of them with a prompt new hearing at which each might obtain parole. Accordingly, their claims, if successful, would "necessarily imply the invalidity of a state . . . sentence."

Johnson, for example, advances two types of claims challenging his 1999 release decision. First, he asserts an ex post facto claim predicated on the use of the 1998 Guidelines in making that release decision. Second, he advances a due process claim based on a variety of alleged procedural defects, including challenges to the panel's composition and to the hearing officer's alleged refusal to allow him to speak. Johnson Complaint, J.A. 42-53.

The State does not admit that either of these claims is valid or that Johnson will obtain success on them. But both are of the type that, if successful, would necessarily imply that the original decisions cannot stand. First, if Johnson can

establish an ex post facto claim, the State concedes that he would be entitled to a new parole hearing. See *Miller v. Florida*, 482 U.S. 423 (1987) (sentence imposed in violation of Ex Post Facto Clause requires resentencing). Second, while his due process claim may ultimately fail to state a claim,[8] his claim, if successful, would entitle Johnson to a new hearing. Indeed, to the extent that Johnson's challenge rests on the refusal to allow him to speak, his claimed error is virtually identical to the error this Court identified in *Balisok* as "necessarily implying the invalidity" of a state decision.[9] 520 U.S. at 647-648.

Further, any doubt on the "invalidation" question is resolved by looking to the relief Johnson seeks. While his complaint contains only a general request for "declaratory and injunctive relief," his Sixth Circuit briefing expressly demonstrates that the form of injunctive relief he seeks is an order requiring an immediate new parole hearing. See Opening Brief at 15 ("A new . . . parole hearing is the relief Johnson seeks."). But that relief would necessarily "imply the invalidity" of the decision from his previous hearing. Indeed, the requested relief is an even more direct attack on the state decision than the money damages requested as relief in *Heck* and *Balisok*. Having expressly sought relief vacating

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[8] There is no liberty interest in parole, a necessary predicate to a due process claim. *Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex*, 442 U.S. 1, 15-16 (1979) (inmates with a liberty interest in parole must be given an opportunity to be heard).

[9] One key difference between this case and *Balisok* is that there the inmate did have a liberty interest in his good-time credits, which would support a due process claim. *Sandin v. Conner*, 515 U.S. 472, 487 (1995). In the parole context, by contrast, there is no liberty interest, and thus no due process claim. *Greenholtz, supra*. This difference, however, goes to the likelihood of *success* on the claim, and not to what would follow if the claim *were* successful. Thus, the *Heck* analysis is unaffected by questions of liberty interest.

the old decision and requiring a new one, Johnson cannot now contend that he does not seek to invalidate the previous decision.

Dotson's claims also seek, at least in part, to invalidate his sentencing decision. Like Johnson, he contends that the parole officer violated the Ex Post Facto Clause by relying on certain 1998 amendments to the parole regulations in reaching that decision. Dotson Complaint ¶¶ 1-4, J.A. 17-18. And, like Johnson, he requests as relief an "immediate new hearing." Moreover, as with Johnson, the State concedes that, if the officer violated the Ex Post Facto Clause, the previous sentencing decision cannot stand. See *Miller*, *supra*. Thus, as with Johnson, his ex post facto claims should be *Heck*-barred.

To the extent that he seeks purely declaratory relief regarding how future hearings are conducted, however, his claims are admittedly a somewhat closer call. The Court observed in *Balisok* that purely prospective relief "ordinarily" will not "necessarily imply . . . invalidity." 520 U.S. at 649. But that observation seemed driven more by the nature of the claim being discussed than the prospective or retrospective nature of the relief sought. That is, in that part of *Balisok*, the Court addressed a claimed error—that the Warden's alleged refusal to time-stamp documents violated due process—that was insufficiently egregious to "imply invalidity," because such an error simply would not undercut a resulting decision. Thus, such a claim would not be *Heck*-barred, even if a court ordered a warden to time-stamp in the future, because a statement about the need to time-stamp would not imply that past decisions were invalid.

The nature of Dotson's claim here is far different. It is difficult to conceive how a federal declaration that using the 1998 Guidelines at the 2005 hearing would violate the Ex

Post Facto Clause would not, in turn, imply that their use at the 2000 halfway review similarly violated the Ex Post Facto Clause. If so, however, the declaration regarding future use would necessarily imply the invalidity of the decision reached in the past. Under the reading of *Balisok* we urge, then, Dotson's claim is barred in its entirety. At most, though—even if *Balisok* is read to create a bright-line exception for forward-looking relief, an exception that is independent of the nature of the claim—Dotson can proceed only as to his declaratory-relief claim regarding the conduct of already-scheduled future hearings.

All other aspects of both Johnson's and Dotson's claims "necessarily imply the invalidity" of extant state sentencing decisions. Indeed, the parallels between this case and *Balisok* are striking. In both cases, the inmates claim that hearings regarding a sentence-shortening device were constitutionally flawed. In both cases the claims, if successful, would not guarantee that their sentences would be shortened, only that they would get new hearings. In both cases the new hearings could result in the same substantive outcome. The Court nonetheless held that the claims were *Heck*-barred. Respondents have no way around those dispositive facts—Respondents must overcome the *Heck* bar. They do not.

B. *Heck* incorporates and extends *Preiser's* rule, under which prisoners asserting claims, such as those here, that fall within the core of habeas must use habeas rather than Section 1983.

Examining the interplay between *Heck* and *Preiser v. Rodriquez*, 411 U.S. 475 (1973), further confirms that the *Heck* bar applies to Respondents' claims. One consistent theme that has animated this Court's harmonization of § 1983 and the habeas statutes since *Preiser* is this: § 1983

cannot be used to advance claims within the traditional reach of the more specific habeas statutes, because allowing that would eviscerate the habeas exhaustion requirement. *Heck* did nothing to undermine that rule—to the contrary, it extended it. Because the Respondents' claims are within the traditional scope of habeas, that rule bars them from using § 1983 to advance their claims here.

1. Where a prisoner's claim falls squarely within the traditional scope of habeas, habeas is the exclusive federal vehicle for advancing that claim.

Preiser was the first case considering the appropriate routing of claims that are textually cognizable under both the habeas statutes and § 1983. The Court recognized that "Congress has made the specific determination . . . that requiring the exhaustion of adequate state remedies," a necessary precondition of habeas relief when claims implicate state sentences, "will best serve the policies of federalism." *Preiser*, 411 U.S at 492, n.10. It also recognized that allowing state prisoners to press such claims under § 1983 "would wholly frustrate explicit congressional intent" because they "could evade [the habeas exhaustion] requirement by the simple expedient of putting a different label on their pleadings." *Id.* at 489-490. The Court therefore concluded that "Congress has determined that habeas corpus is the appropriate remedy for state prisoners attacking the . . . length of their confinement, and that specific determination must override the general terms of § 1983." *Id. Preiser* determines whether a prisoner's claim falls within that region by examining the relief sought. If he seeks to expedite his release, his claim is within the exclusive control of habeas.

Further, a majority of the Court's members have recognized that *Heck* is similarly rooted in the need to protect the scope of habeas and its attendant exhaustion requirement.[10] See *Heck*. 512 U.S. at 491 (Thomas., J., concurring) ("Because the Court today limits the scope of § 1983 in a manner consistent both with the federalism concerns undergirding the explicit exhaustion requirement of the habeas statute . . . I join the Court's opinion."); *id.* at 499 n.4, 500, 503 (Souter, J. concurring, joined by Blackmun, Stevens and O'Connor, J.J.) ("[T]he proper resolution of this case . . . is to construe § 1983 in light of the habeas statute and its explicit policy of exhaustion."). See also *Spencer v. Kemna*, 523 U.S.1, 20 (1997) (Souter, J., concurring, joined by O'Connor, Ginsburg, and Breyer, J.J.) ("[T]he statutory scheme must be read as precluding such attacks . . . because [*Heck*] was a simple way to avoid collisions at the intersection of habeas and § 1983.) (citations and internal punctuation omitted), *id.* at 21 (Ginsburg, J., concurring), *id.* at 25, n.8 (Stevens, J., dissenting).

Any doubt on that point was removed when the unanimous Court recently observed that "conditioning the right to bring a § 1983 action on a favorable result in state litigation or federal habeas served the practical objective of preserving limitations on the availability of habeas remedies." *Muhammad*, 124 S. Ct. at 1304.

Although *Heck* reflects that policy, it goes further than *Preiser* in one important respect—it looks beyond the relief sought (the focus of *Preiser*) to examine a claim's indirect impact on a confinement decision (*i.e.*, a conviction or sentence). Claims are barred if they would necessarily remove the legal foundation for such a decision, even if the

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[10] To be sure, the *Heck* majority also explained the rule purely in § 1983 terms without regard to the availability of habeas.

claimant stops short of seeking immediate or speedier release. That is made plain by *Heck* itself, which barred a claim "clearly not covered by the holding of *Preiser*." 512 U.S. at 481. *Nelson* also recognized that the *Heck* doctrine is more protective of the habeas statutes than *Preiser*, stating that *Heck* even bars claims "at the margins of habeas," *Nelson v. Campbell*, 124 S. Ct. 2117, 2124 (2004) (per curiam), an area beyond the "core" territory that *Preiser* protects.

In sum, the *Heck* doctrine is simply an extension of the policy recognized in *Preiser*. Under *Preiser*, prisoners must use habeas, despite the textual applicability of § 1983, to advance those claims that fit within the traditional scope of habeas. Because Respondents' claims fit within that scope (as shown below), they are necessarily within *Heck*'s protective zone (which extends to the "margins of habeas"). Thus, the claims here are *Heck*-barred.

2. Respondents' claims lie at the core of habeas, as each seeks an immediate new hearing, which will provide a chance for immediate release.

Two lines of precedent, those concerning challenges to criminal sentences and those concerning indistinguishable claims about the parole process, show that Respondents' claims fall within the traditional scope of habeas.

a. This Court has consistently held that claims challenging criminal sentences are properly adjudicated in habeas. That is so not just because of the nature of the claim, but because the prisoner advances his claim in order to affect the duration of his sentence (*i.e.*, to obtain release, or earlier release, from custody), or to somehow revise the sentence originally imposed. Thus, habeas is used to challenge the imposition of a death sentence, because an inmate there seeks

to prevent the carrying-out of that sentence. The Court has likewise held that the habeas statutes control attacks on the severity of non-capital sentences, *Lockyer v. Andrade*, 538 U.S. 63 (2003); *Lackawanna County District Attorney v. Coss*, 532 U.S. 394 (2001), and has ordered habeas relief for other federally recognized defects in sentences. *In re Bonner*, 151 U.S. 242 (1894); *Humphrey v. Cady*, 405 U.S. 504 (1972). In all of these cases, the relief sought was a cancellation or adjustment of sentence, or a chance at resentencing. In short, habeas governs all claims that seek to revise an ongoing or future sentence.

Presier was a particular application of that general principle, as it reinforced the rule that a claim falls within the scope of the habeas statutes if it challenges continued confinement. 411 U.S. at 489. Respondents' claims therefore sound in habeas if they seek, as a prospective matter, to alter the actual time served in confinement, using a federal court order as a tool.

That forbidden relief is what Respondents seek. They asked federal courts to set aside their extant parole decisions. As noted above, those are sentencing decisions. See above at 20-23. See also *Woods*, 89 Ohio St. 3d at 511. Respondents cannot be released without new parole hearings, and those decisions precluded new hearings for ten years. Respondents' claims that those decisions are constitutionally tainted are therefore a direct attack on the duration of their confinement under *Presier* and lie at the very heart of habeas.

b. The weight of precedent considering similar claims also demonstrates that such claims are typically brought in habeas. This Court's cases, which represent only the tip of the judicial iceberg, have included a steady complement of cases in which prisoners used the habeas statutes to press claims challenging various aspects of the parole release

process. *California Dept. of Corrections v. Morales*, 514 U.S. 499, 504 (1995); *United States Dept. of Justice v. Julian*, 486 U.S. 1, 7 n. 5 (1988); *Jago v. Van Curan*, 454 U.S. 14, 16 (1981); *United States Parole Commission v. Geraghty*, 445 U.S. 388, 393 (1980); *Warden v. Marrero*, 417 U.S. 653, 655 (1974); *Conway v. California Adult Parole Authority*, 396 U.S. 107 (1969). While those cases admittedly did not address the question of whether the underlying claims were properly brought in habeas, the consistent pattern of such claims being brought under the habeas statutes reflects an understanding that they are within the traditional scope of those statutes.

Further evidence of that understanding comes from the solid body of lower court precedent squarely ratifying the cognizablity of parole-release claims under the habeas statutes. Although there is some uncertainty about whether such claims should be brought under 28 U.S.C. §§ 2241 or 2254, the circuits agree that claims challenging parole release procedures can be brought under one or the other of those statutes. *Coady v. Vaughn*, 251 F.3d 480, 484 (3d Cir. 2001); *Crouch v. Norris*, 251 F.3d 720, 723 (8th Cir. 2001); *Thomas v. Crosby*, 317 F.3d 782 (11th Cir. 2004). Indeed, the courts have held that the same sort of ex post facto and due process claims made here can be brought under the habeas statutes. *Coady*, 251 F.3d at 488 (ex post facto claim based on application of new parole standards); *Thomas*, 371 F.3d at 790. (Tjoflat, J., concurring) (ex post facto claim based on changes in frequency of parole hearings and due process claim based on consideration of false evidence).

In sum, several factors point to the conclusion that Respondents' claims are squarely within the mainstream of habeas corpus. Consequently, the policy running from *Preiser* through *Heck* and beyond bars their prosecution under § 1983.

3. That Respondents' claims will not necessarily result in earlier release does not take them outside the traditional scope of habeas.

The mere fact that success on a prisoner's claims will not *guarantee* earlier release does not remove the claims from the scope of habeas. The history of the habeas statutes, this Court's application of those statutes, and the realities of habeas practice all strongly support the proposition that such claims are well within the traditional scope of the habeas.

a. The history of the habeas statutes provides two strong signals that Congress did not limit habeas to claims whose success would inevitably result in earlier release. To be sure, the original habeas statutes applicable to state prisoners authorized relief only if the petitioner could prove that "he or she [should] *forthwith be discharged* and set at liberty." Habeas Corpus Act of February 5, 1867, 14 Stat. 385 (emphasis added). Congress later removed that restriction, however, authorizing habeas courts "to dispose of the party as law and justice require," Rev. Stat. § 761 (1874), an authorization that, as discussed below, has been carried forward to this day. The intent of that change is clear: Congress abandoned any requirement that habeas claims must, if successful, result in outright release.

The second signal shows that Congress has ratified the processing of precisely the sort of claims pressed here—those resulting in rehearings likely yielding the same substantive outcomes—through habeas corpus. About a century ago, several early habeas cases involved violations that could be cured by new proceedings almost certainly resulting in the same substantive outcome. *In Re Medley*, 134 U.S. 160 (1890); *In re Bonner*, 151 U.S. 242 (1894); *Mahler v. Eby*, 264 U.S. 32 (1924). In each case, the Court sustained the

claims but relied upon the language of former § 761, discussed above, to order curative proceedings rather than outright release. *In re Medley*, 134 U.S. at 173-174; *In re Bonner*, 151 U.S. at 261; *Mahler*, 264 U.S. at 45-46. Congress has reenacted that language without material change, and it is now codified in the last paragraph of the present 28 U.S.C. § 2243. *Peyton v. Rowe*, 391 U.S. 54, 66-67 (1968) (discussing legislative history). Congress "is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." *Lorillard, Div. of Loew's Theatres, Inc. v. Pons*, 434 U.S. 575, 580 (1978). It has therefore ratified the proposition that claims resulting in rehearing can be brought through habeas.

b. Two of this Court's decisions, *Peyton v. Rowe* and *Garlotte v. Fordice*, 515 U.S. 39 (1995), also establish that Respondents' claims are not removed from habeas merely because they will not result in outright release. In both cases, inmates brought habeas cases intended to expedite parole eligibility under systems, like Ohio's, where parole was completely discretionary. *Garrett v. Commonwealth*, 14 Va. App. 154, 157, 415 S.E.2d 245, 247 (Va. App. 1992); *Vice v. State*, 679 So. 2d 205, 208 (Miss. 1996). In both cases, the prisoners, if successful, would have ended up where these Respondents seek to be: at the door of the hearing room with no guarantee of what lies on the other side. In both cases, the State argued that the claims did not sufficiently implicate their continued custody to be properly brought in habeas.

Peyton rejected the argument that the petition should be denied merely because the claims would not result in immediate release. The Court held that the habeas statutes do "not deny the federal courts power to fashion appropriate relief other than immediate release," noting that "[s]ince 1874, the habeas corpus statute has directed the courts to

determine the facts and dispose of the case summarily, 'as law and justice require.'" 391 U.S at 66-67. *Garlotte* likewise concluded that the claim's potential impact upon parole was sufficient to bring it within the core of habeas corpus even if it did not directly affect the prisoner's actual confinement. "Invalidation of Garlotte's marijuana conviction would advance the date of his *eligibility* for release from present incarceration. Garlotte's challenge, which will shorten his term of incarceration if he proves unconstitutionality, *implicates the core purpose of habeas review*." 515 U.S. at 47 (emphasis added). *Peyton* and *Garlotte* show that a claim does not have to guarantee release to be within the core of habeas; it need only move the prisoner closer to the exit door.

c. The realities of habeas practice also prove that Respondents' claims fall squarely within the habeas statutes. Seeking rehearing rather than release, as Respondents do here, is perfectly consistent with habeas practice—a rehearing is what happens in the overwhelming percentage of successful habeas cases. "It should be borne in mind that the typical order of the District Court in such circumstances is a conditional release, permitting the State to rearrest and retry the petitioner without actually discharging him from custody." *Fay v. Noia*, 372 U.S. 391, 440 n.45 (1963). Thus, because almost all habeas cases result in retrial, not release, Respondents' efforts to obtain rehearing supports, rather than undermines, the conclusion that their claims are within the traditional scope of habeas corpus.[11]

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[11] Also, a habeas petition challenging a parole-related decision will not be barred as a second or successive petition, even if a prisoner has already filed a habeas petition attacking his conviction. That is because a parole-related petition challenges custody, not conviction, and because later-arising parole issues could not have been raised in an initial habeas petition challenging a conviction. See *Hill v. Alaska*, 297 F.3d 895, 898 (9th Cir. 2002); *Crouch v. Norris*, 251 F.3d 720, 724 (8th Cir. 2001).

C. Respondents are not helped by the Court's cases involving the use of § 1983 in parole or good-time contexts.

Petitioners recognize that, at first glance, some of the Court's precedents might seem to support Respondents, as some cases have involved the use of § 1983 in challenges to procedures involving parole or good-time credits. Indeed, the court below, as well as Respondents (at the certiorari stage), have relied on cases such as *Wolff v. McDonnell*, 418 U.S. 539 (1974); *Greenholtz v. Inmates of the Nebraska Penal & Correctional Complex*, 442 U.S. 1 (1979); *Board of Pardons v. Allen*, 482 U.S. 369 (1987); and *Garner v. Jones*, 529 U.S. 244 (2000). *Wolff* allowed inmates to use § 1983 to press claims about the process for revoking good-time credits. *Greenholtz* and *Allen* and *Garner* were § 1983 cases contesting parole-release procedures. Closer examination reveals that those cases are inapposite.

First, the latter trilogy of cases—*Greenholtz*, *Allen* and *Garner*—do not establish that § 1983 was *properly* an available remedy in those cases, as the Court never addressed the issue in any of those decisions. In all three cases, plaintiffs used § 1983 to press claims similar to those here, but the Court simply addressed those claims on the merits. Apparently, no one challenged whether § 1983 was an appropriate vehicle in those cases, so the Court had nothing before it but the merits issues. Thus, the "most that can be said is that the point was in the case if anyone had seen fit to raise it. Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Webster v. Fall*, 266 U.S. 507, 511 (1925).

Wolff, meanwhile, did address the use § 1983 for parole-related claims, but it is distinguishable for other

reasons. *Wolff* came after *Preiser*, but before *Heck*. Thus, the Court's focus in *Wolff*, under the *Preiser* approach, was on whether the *Wolff* claims fell in the "core of habeas" by seeking speedier release. 418 U.S. at 554. As the Court explained, the *Wolff* plaintiffs challenged the procedures that New York had established for revoking good-time credits, claiming that the procedures violated due process. Those plaintiffs sought, as relief, (1) restoration of any good time credits already revoked, (2) prospective injunctive relief ensuring that future hearings would use valid procedures, and (3) damages associated with the previous deprivation of due process. *Id.* at 553.

Applying the *Preiser* rule, which looked only at whether "speedier release" was the relief sought, the Court in *Wolff* separately analyzed each of the above three types of relief, with differing results. That tripartite division demonstrates how *Wolff*, properly understood, supports Petitioner in part, while any part of *Wolff* that might have helped Respondents has been supplanted by *Heck* and *Balisok*.

First, the *Wolff* Court easily found that the restoration of good-time credits was foreclosed under *Preiser*. *Id.* at 554. That part of *Preiser*/*Wolff*—barring injunctions aimed at speedier release—remains good law today. And, as explained above (at 31-34), that rule stands in Respondents' way, barring their claims to the extent that they seek a new hearing as a means to perhaps achieve earlier release.

Second, the *Wolff* Court allowed the inmates there to pursue *purely prospective* relief, aimed at forcing the prison officials to use different procedures in the future. 411 U.S. at 555 (*Preiser* did not bar relief "enjoining prospective enforcement of invalid [] regulations."). That part of *Wolff* also remains good law: not only was it left undisturbed in

Heck, but it was also expressly reaffirmed in *Balisok*. So long as nature of the prospective relief does not "'necessarily imply' the invalidity of a previous" state decision, it can go forward. 520 U.S. at 648 (remanding for determination whether particular prospective relief sought would necessarily imply the invalidity of any past decision).

Third, the *Wolff* Court allowed a claim for damages to proceed, but that part of *Wolff* was what the Court dramatically altered in *Heck* and *Balisok*. The *Wolff* Court took the narrowest possible reading of *Preiser*, saying that, "under that case, only an injunction restoring good time improperly taken is foreclosed." *Wolff*, 418 U.S. at 555. Thus, not only would a damages claim be allowed, but so, too, would a request for a "declaratory judgment as a predicate to a damages award." *Id.*

But as *Heck* and *Balisok* both explained, *Wolff* did not give blanket permission for all damages claims or all declaratory relief—and if *Wolff* did seem to do that, then any such implication was overruled in *Heck*. *Heck* involved a damages claim shorn of a demand for *any* injunctive relief, whether immediate release, or new trial, etc. *Heck*, 512 U.S. at 479. Not only did the Court bar that claim, but the Court specifically explained how *Wolff* was limited: *Wolff* allowed damages claims or declaratory claims *only if* those claims were for "using the wrong procedures, not the wrong result." *Heck*, 512 U.S. at 482-83. But, *Heck* explained, even attacks on wrong procedures would be barred if those "wrong procedures" were sufficiently erroneous that the resulting decision could not stand in light of them. Whether the "wrong procedures" rise to that level, however, turns upon

the *Heck/Balisok* analysis, and, as explained above, Respondents' claims are barred under that standard.[12]

The bottom line is that *Wolff* does not preserve some category of claims outside the *Heck/Balisok* realm; rather, *Wolff* was part of the evolution from *Preiser* to *Heck*, and its rules were refined by *Heck*. Thus, Respondents must clear *Heck* on its own terms to hurdle the *Heck* bar, and they cannot simply go around it by pointing to *Wolff*.

D. Petitioners' reading of *Heck* best protects the comity and federalism concerns that underlie *Preiser* and *Heck*.

Ohio admits that the rule we seek is not compelled by the literal text of § 1983, for, as the Court explained in *Preiser*, the broad language of § 1983 could encompass even cases that tread on the core of habeas, as in *Preiser* itself. This was also true in *Heck* and *Balisok*. But, as the Court has explained, concerns of comity and federalism often require that § 1983 not receive the full breadth that its language suggests. The Court has often limited § 1983 in two situations, and this case fits comfortably within both categories. First, the Court has stayed the federal hand when § 1983 litigation could disrupt a core state function. Second, the Court has restricted § 1983 when deferring federal litigation might avoid constitutional adjudication by giving the parties—and state courts—a chance to resolve their dispute on state law grounds.

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[12] Moreover, *Wolff's* preservation of damages claims would not help Respondents, as neither seeks damages. At most, they could seek refuge in *Wolff's* approving language about "declaratory judgment as a predicate," but such a declaratory claim can proceed only if it does not imply the invalidity of the parole decisions. And, in any event, Respondents cannot seek declaratory relief designed to secure speedier release, such as by necessarily implying the need for new hearings.

1. Applying *Heck* to parole release claims would limit federal intrusion into state sentencing matters.

The Court has recognized that the broad sweep of § 1983's text is limited by the need to preserve comity between the federal courts and the States when a claim under that statute implicates important state interests.

For example, the Court explained in *Stefanelli v. Minard*, 342 U.S. 117 (1951), that the "Court's lodestar of adjudication has been that [§ 1983] should be construed so as to respect the proper balance between the States and the federal government in law enforcement" and that the States' strong interest in enforcing their criminal law supersedes the "generality of language of the Civil Rights Act." *Id.* at 120, 121 (internal punctuation and citations omitted).

Preiser and its progeny fit within this broader pattern of deference to state concerns, for it "is difficult to imagine an activity in which a State has a stronger interest, or one that is more intricately bound up with state laws, regulations, or procedures, than administration of its prisons." See *Preiser*, 411 U.S. at 491. The state interest in prison management includes decisions regarding parole, which are as worthy of deference as the good-time credit decisions at issue in *Preiser*. "The parole-release decision . . . is . . . subtle and depends on an amalgam of elements, some of which are factual but many of which are purely subjective appraisals by the Board members based upon their experience." *Greenholtz*, 442 U.S at 9-10.

That intuitive process is by its very nature particularly susceptible to disruption, and inmates are likely to use § 1983 to try to influence it. Indeed, parole-related § 1983 cases are

already legion, as shown in part by the parole-related cases that have confounded the circuits in deciding when to apply the *Heck* bar. *Anyanwutaku v. Moore*, 151 F.3d 1053 (D.C. Cir. 1998); *Butterfield v. Bail*, 120 F.3d 1023 (9th Cir. 1997).

Thus, applying the *Heck* bar here will help to protect the states' parole systems from the effects of overly frequent § 1983 litigation. Lifting that burden would, in turn, allow parole bodies and prison officials to concentrate on the difficult work immediately before them.

2. Applying the *Heck* rule will foster resolution of parole disputes without federal constitutional adjudication, as state courts could resolve such claims.

In addition to avoiding interference with core state proceedings, the Court has also consistently sought to defer adjudication of § 1983 claims if there is a fair possibility that the underlying dispute can be resolved by state courts on state law grounds. See, *e.g.*, *Moore v. Sims*, 442 U.S. 415, 429-430 (1979); *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 10-12 (1987). Both practical and comity-based reasons support that approach, as it "offers the opportunity for narrowing constructions that might obviate the constitutional problem and intelligently mediate federal constitutional concerns and state interests." *Moore*, 442 U.S at 429-430; *Pennzoil*, 481 U.S at 12 ("Thus, when this case was filed in federal court, it was entirely possible that the [state] courts would have resolved this case on state statutory or constitutional grounds, without reaching the federal constitutional questions Texaco raises in this case.").

Indeed, such federalism concerns have always been at the root of the *Preiser/Heck* line of cases. In those cases, the Court left no doubt that it did not seek to channel cases

toward habeas, rather than § 1983, simply to see such cases resolved in federal habeas. Rather, the main virtue of routing cases toward habeas is that habeas in turn channels disputes toward state forums whenever reasonably possible. See *Preiser*, 411 U.S. at 480-490; *Heck*, 512 U.S. at 498 (Souter, J., concurring). As the Court explained, § 1983 does not require state-court exhaustion; habeas does. Moreover, while the Prison Litigation Reform Act now requires prisoners to first seek administrative remedies, that exhaustion requirement does not require state *court* remedies to be exhausted, so it is not nearly as robust as the habeas exhaustion doctrine. *Muhammad*, 124 S. Ct. 1303, 1304 (2004) ("Prisoners suing under § 1983 . . . generally face a substantially lower gate [than in habeas], even with the requirement of the Prison Litigation Reform Act of 1995 that administrative opportunities be exhausted first.").

The link between habeas and state-court resolution is critical here, because parole claims can be more effectively resolved, or at least narrowed, if they are first vetted in state courts. Detailed administrative provisions control Ohio's parole procedure, and those rules have the potential to greatly influence, if not completely resolve, prisoners' parole claims. See Ohio Admin. Code Chapter 5120:01 (selected portions at J.A. 21-24; Supp 2-9). These administrative rules are further amplified by formal policies, and Ohio has adopted detailed parole guidelines that govern parole decisions. Thus, federal courts hearing parole-related § 1983 claims would need to navigate and interpret a complex body of state law, without the benefit of state-court guidance. By contrast, Ohio courts already have significant experience with Ohio's parole law. Applying *Heck*'s favorable termination requirement would put that experience to work.

Actual experience demonstrates the benefits of initially routing parole claims through the state courts. Ohio

prisoners challenged aspects of Ohio's parole guidelines in 2000, bringing both federal claims under § 1983 and state law claims in Ohio's courts. Those challenges implicated thousands of extant parole decisions and resulted in myriad § 1983 claims in federal courts. While those federal claims were pending, the propriety of the underlying practice was ultimately resolved on state law grounds by the Ohio Supreme Court. See *Layne v. Ohio Adult Parole Auth.*, 97 Ohio St.3d 456, 780 N.E.2d 548 (2002). That mooted the related federal claims, *Michael v. Ghee*, Case No. 3:01CV7436 (N.D. Ohio March 24, 2003), but only after the federal court spent considerable time and effort on those claims, and only after Ohio's prison officials had been haled into federal court.

The record here indicates that similar non-federal resolutions might be possible in these cases. Respondents both allege federal ex post facto violations. Such claims, if meritorious, would also implicate the analogous anti-retroactivity provisions of § 28, Art. II, of Ohio's Constitution. Further, Respondent Johnson not only claims that the Petitioners deprived him of due process, but he also charges that prison officials violated several provisions of Ohio law in conducting his parole hearing. Although the merits of those claims are unclear, their state-law nature leaves no doubt that state law could resolve some of these claims without need for federal constitutional adjudication.

And as noted above, Ohio makes state-law remedies available for parole-related claims. Prisoners may use declaratory judgment as a "remedy to determine the constitutionality or constitutional application of the parole-guidelines," *Hattie v. Anderson*, 68 Ohio St.3d 232, 235, 626 N.E.2d 67 (1994), and Ohio's courts have also granted significant relief on state law grounds. *Layne v. Ohio Adult Parole Auth.*, 97 Ohio St.3d 456, 780 N.E 2d 548 (2002).

Other States have likewise granted substantial relief to prisoners advancing parole release claims based on state law, *Trantino v. New Jersey State Parole Board*, 764 A.2d 940 (N.J. 2001); *Sage v. Gamble*, 929 P.2d 822 (Mont. 1996); *State ex rel. Shields, v. Purkett*, 878 S.W.2d 42 (Mo. 1994), and federal constitutional theories, *New Jersey Parole Board v. Byrne*, 460 A.2d 103 (N.J. 1983); *Trasker v. Mohn*, 267 S.E.2d 183 (W. Va. 1980); *In re Sinka*, 599 P.2d 1275 (Wash. 1979).

If the Court directs claims like those here to habeas, States will be able to use those state-court procedures. But if such claims proceed in § 1983, that opportunity is lost, and federal judges around the country will sit as state parole boards. That is not the law, nor should it be.

CONCLUSION

For the above reasons, the judgments below should be reversed.

Respectfully submitted,

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SUPPLEMENT

Ohio Rev. Code Ann. § 2967.03 (Anderson 1994)

The adult parole authority may exercise its functions and duties in relation to the . . . parole of a prisoner eligible for parole, upon the initiative of the head of the institution wherein the prisoner is confined, or upon its own initiative.

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The authority may . . . grant a parole to any prisoner, if in its judgment there is reasonable ground to believe that . . . such action would further the interests of justice and be consistent with the welfare and security of society.

Ohio Rev. Code Ann. § 2967.12 (Anderson 1994)

(A) Except as provided in division (F) of this section, at least three weeks before the adult parole authority . . . grants any parole, notice of the . . . parole, setting forth the name of the person on whose behalf it is made, the crime of which he was convicted, the time of conviction, and the term of sentence, shall be sent to the prosecuting attorney and the judge of the court of common pleas of the county in which the indictment against the convict was found. If there is more than one judge of that court of common pleas, the notice shall be sent to the presiding judge of the court.

(B) If a request for notification has been made . . . the adult parole authority also shall send a notice to the victim . . . prior to . . . granting any parole to, the person. The notice shall be provided at the same time as the notice required by division (A) of this section and shall contain the information required to be set forth in that notice. The notice also shall inform the victim or the victim's representative that

he may send a written statement relative to the victimization and the pending action to the adult parole authority and that any statement received by the adult parole authority prior to . . . granting a parole will be considered by the authority before . . . a parole is granted.

Ohio Rev. Code Ann. § 2967.13 (Anderson 1994)

(A) A prisoner serving a sentence of imprisonment for a felony for which an indefinite term of imprisonment is imposed becomes eligible for parole at the expiration of his minimum term, diminished [certain credits].

(B) A prisoner serving a sentence of imprisonment for life for the offense of first degree murder or aggravated murder, which sentence was imposed for an offense committed prior to October 19, 1981, becomes eligible for parole after serving a term of fifteen full years.

Ohio Admin. Code § 5120:1-1-07 (1997)

(A) An inmate may be released on or about the date of his eligibility for release, unless the parole board, acting pursuant to rule 5120:1-1-10 of the Administrative Code, determines that he should not be released on such date for one or more of the following reasons:

(1) There is substantial reason to believe that the inmate will engage in further criminal conduct, or that the inmate will not conform to such conditions of release as may be established under rule 5120:1-1-12 of the Administrative Code;

(2) There is substantial reason to believe that due to the serious nature of the crime, the release of the inmate into society would create undue risk to public safety, or that due

to the serious nature of the crime, the release of the inmate would not further the interest of justice nor be consistent with the welfare and security of society;

(3) There is substantial reason to believe that due to serious infractions of division level 5120:1 of the Administrative Code, the release of the inmate would not act as a deterrent to the inmate or to other institutionalized inmates from violating institutional rules and regulations;

(4) There is need for additional information upon which to make a release decision.

(B) In considering the factors specified in paragraph (C) of this rule, the parole board shall consider the following:

(1) Any reports prepared by any institutional staff member relating to the inmate's personality, social history, and adjustment to institutional programs and assignments;

(2) Any official report of the inmate's prior criminal record, including a report or record of earlier probation or parole;

(3) Any presentence or postsentence report;

(4) Any recommendations regarding the inmate's release made at the time of sentencing or at any time thereafter by the sentencing judge, presiding judge, prosecuting attorney, or defense counsel;

(5) Any reports of physical, mental or psychiatric examination of the inmate;

(6) Such other relevant written information concerning the inmate as may be reasonably available, except that no document related to the filing of a grievance under rule 5120-9-31 of the Administrative Code shall be considered;

(7) Written or oral statements by the inmate, other than grievances filed under rule 5120-9-31 of the Administrative Code.

(C) In making any determination under paragraph (A) of this rule, the parole board may take into consideration any of the following factors:

(1) The inmate's ability and readiness to assume obligations and undertake responsibilities, as well as the inmate's own goals and needs;

(2) The inmate's family status, including whether his relatives display an interest in him or whether he has other close and constructive association in the community;

(3) The type of residence, neighborhood, or community in which the inmate plans to live;

(4) The inmate's employment history and his occupational skills;

(5) The inmate's vocational, educational, and other training;

(6) The adequacy of the inmate's plan or prospects on release;

(7) Any recommendations made by the sentencing courts;

(8) The inmate's conduct during his term of imprisonment;

(9) The inmate's behavior and attitude during any previous experience of probation, furlough, parole, or other administrative release and the recency of such experience;

(10) The availability of community resources to assist the inmate;

(11) The nature of the offense for which the inmate was convicted;

(12) The inmate's pattern of criminal or delinquent behavior prior to the current term of imprisonment;

(13) The physical and mental health of the inmate as they reflect upon the inmate's ability to perform his plan of release;

(14) The presence of outstanding detainers against the inmate;

(15) Any recommendations made by the staff of the department of rehabilitation and correction or any of its agencies;

(16) Any other factors which the board determines to be relevant, except for documents related to the filing of a grievance under rule 5120-9-31 of the Administrative Code.

Ohio Admin. Code § 5120:1-1-11 (1976)

(A) A hearing shall be held by the Parole Board prior to the release of an inmate in a state penal or reformatory institution pursuant to Administrative Regulation 5120:1-1-07.

Ohio Admin. Code § 5120:1-1-20 (1998)

(A) A prisoner who was denied release at a regular parole release hearing that occurred before April 1, 1998 and scheduled for his next parole hearing twenty months or more after the date of that hearing, will have his record reviewed for a possible earlier hearing after one year or half of the length of the continuance, whichever is later. For the purpose of this rule, a regular parole release hearing is a hearing conducted for the purpose of determining whether or not to release the prisoner on parole after he has served the time required by section 2967.13 of the Revised Code. A parole revocation hearing or a hearing by the parole board to consider a prisoner for shock parole, furlough or any other type of release is not a regular parole release hearing for the purpose of this rule and shall not establish a right to have the prisoner's file reviewed pursuant to this rule. A prisoner granted a projected release date or denied release at a parole hearing on or after April 1, 1998 shall not be reviewed pursuant to this rule.

(B) The review of the prisoner's case shall be conducted by a parole board hearing officer or other person designated by the chairman of the parole board. In conducting the review, the hearing officer shall consider information contained in the records maintained in central office, the institution master file, the institution unit file and any information submitted by the prisoner, in writing, for consideration.

(C) At least seven days before the review, the prisoner will be given a written notice that the review will occur and that he may submit a written statement and relevant documents for consideration during the review process. The notice shall advise the prisoner the approximate date that the review will occur and to whom he should submit documents

that he would like to have considered. The prisoner does not have the right to personally appear before the hearing officer.

(D) In conducting the review, the hearing officer shall review the details of the crime or crimes that led to the prisoner's current commitment, his prior criminal activity, problem areas that contributed to his criminal activity, involvement in available programs to address these problem areas, and institutional conduct. Ordinarily, the review will be confined to the prisoner's records and documents submitted by him for consideration. However, the officer may, at his discretion, request additional information or interview any person who might have information relevant to the inquiry.

(E) If the hearing officer determines that the prisoner has obeyed the rules of the institution and, since the time the parole board made its original decision, there have been changes in the prisoners circumstances of such significance that the parole board might want to reconsider the prisoner's case for possible early release, he may recommend the prisoner for an earlier appearance before the parole board.

(F) If the hearing officer finds that the prisoner has made some significant progress, but does not believe that it is of such magnitude that the release is warranted at this time, or if the hearing officer needs additional information in order to make a recommendation, he may recommend that a release hearing not be held at this time, but reschedule the case for another review prior to the date the prisoner will otherwise be considered for parole.

(G) If the hearing officer finds that since the date parole was denied the prisoner has committed any serious rule infraction, has been confined in local control or administrative control, or has not had changes in his

circumstances of such significance that the board might want to reconsider his case, he shall recommend that an early hearing not be held.

(H) The hearing officer shall submit, in writing to the chairman of the parole board, his recommendation, with reasons for it. If the hearing officer recommends that the prisoner have an early hearing, he shall state the basis of his conclusion that the prisoner has addressed the problem areas that led to his criminal activity or state the reasons that he believes circumstances have now changed to such an extent that the parole board might now conclude that the prisoner can now safely be released into the community. The hearing officer shall submit with his recommendation any written statement or documents submitted by the prisoner.

(I) The hearing officer shall prepare and have forwarded to the prisoner a written notice of his recommendation. The notice shall inform the prisoner of the reason for the recommendation and that he may submit to the chairman of the parole board, within three working days, his written objection to the hearing officer's recommendation.

(J) The chairman of the parole board, or person designated by the chairman, shall review the recommendation of the hearing officer, the materials provided by the prisoner to the hearing officer and any written objection to the hearing officer's recommendation. After the material has been reviewed, the chairman shall decide whether or not to schedule the prisoner for an early parole hearing.

(K) Within twenty eight days of the review, the prisoner shall be advised in writing of the decision of the chairman of the

parole board. If the decision is made to grant an early hearing, the notice will inform the prisoner of the month in which the hearing will be scheduled.

(L)If the chairman of the parole board decides to grant the prisoner an early hearing, he shall notify the record officer of the institution in which the prisoner is confined to schedule the prisoner for a hearing and to send the required notices to the judge, the prosecuting attorney, and if applicable the victim or victim's family.

ODRC Policy 501-36 (1994)

IV. DEFINITIONS

A. RELEASE CONSIDERATION HEARING: a hearing where a minimum of one Parole Board member and one hearing officer meet with the inmate, review and evaluate available information and decide whether to release the inmate to community supervision.

B. RELEASE CONSIDERATION INTERVIEW: a hearing officer meets with the inmate, reviews and evaluates available information and thereafter meets with a Parole Board member to decide upon a recommendation of a final decision regarding the inmate's possible release to community supervision.

C. FULL BOARD HEARING: a hearing which includes all available Parole Board members and which is preceded by a release consideration hearing or interview. The Board decides whether to release the inmate to community supervision.

D. MAXIMUM EXPIRATION DATE: the last day of a period of incarceration set by the court.

E. ELIGIBILITY DATE: a date set by law indicating when an inmate can be considered for release.

F. FIRST HEARING: the initial release consideration hearing set by law.

G. RULES INFRACTION: a violation of inmate rules of conduct established by the Department of Rehabilitation and Correction.

H. REVOCATION HEARING: a hearing conducted by Parole Board staff to determine whether a condition of release has been violated and, if a violation is found, to impose an appropriate sanction.

I. PAROLE BOARD MINUTES: the official public record of the decisions of the Ohio Parole Board.

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VI. PROCEDURE

A. PRE-HEARING PREPARATION

anticipation of Parole Board hearings, institutional record offices and/or unit management staff will:

1. Provide written notice to each inmate within 90 days of admission to an institution specifying the first legal eligibility date for a release hearing and maximum expiration of sentence;

2. During inmate orientation, provide a pamphlet and brief verbal explanation of the Ohio Parole Board Guidelines, the process to request a reconsideration of the decision by the

addition of new information, and the factors which are considered in a release decision by the Board (Administrative Rules 5120:1-1-08 and 5120:1-1-09). Interpreters should provide this information to non-English speaking and special needs offenders as well as advise them that an interpreter may assist them at hearings.

3. Notify each inmate, in writing, at least 14 days in advance of any scheduled hearing before the Ohio Parole Board.

B. HEARING PREPARATION

1. The Parole Board Chair schedules Parole Board members and hearing officers to conduct release consideration hearings or interviews based on the number of eligible inmates. These hearings or interviews should, to the extent administratively possible, be conducted sixty (60) days prior to the inmate's month of release eligibility.

2. At each institution where hearings are conducted, the Parole Board Chair designates, in advance, one Parole Board member to be responsible for assigning cases, determining which cases, if any, are subject to a release consideration interview and coordinating logistics with institution staff.

3. Prior to an initial release interview or hearing, the Parole Board hearing officer reviews the institution master and unit files, Central Office microfiche, information submitted by interested persons, and consults with unit management staff as needed. The information is consolidated by the hearing officer on the release candidate information sheet for each case. The sheet should contain the information listed in Appendix A with copies of the completed sheet placed in the Central Office microfiche file for use at any subsequent hearings or inquiries. The

information is updated prior to subsequent hearings concentrating on the release candidate's institution adjustment, programming, staff evaluations and release planning activities since the initial hearing.

C. HEARING/INTERVIEW PROCESS

1. All hearings are conducted in a setting which the Parole Board Chair or designee determines provides privacy, security, comfort, and a dignified atmosphere.

2. Attendance at hearings is limited to Parole Board staff, the inmate and an inmate's representative, such as an interpreter. Attorneys and witnesses are permitted only at revocation hearings. Unit management staff may provide input prior to the hearing.

3. Parole Board members and hearing officers shall not participate in any aspect of the decision making process when a conflict of interest exists in that case. The Parole Board Chair or designee should be informed of the employee's decision not to participate.

4. The process of consideration of an inmate for release may be initiated as a release consideration interview whereby the hearing officer interviews the inmate and reviews information maintained in the inmate's unit file and master file at the institution, the Central Office microfiche, and information provided by other interested parties. Each release decision hearing will be conducted with the hearing officer and the Parole Board member present unless the Parole Board Chair or designee, or Parole Board member determines that attendance by the inmate is appropriate or warranted.

5. Each release consideration interview or release consideration hearing with an inmate present will include a discussion or presentation to the inmate of the factual information upon which the decision is to be based. This information shall include, but is not limited to:

a. brief details of the committing offense;
b. the offender's role when codefendants are involved;
c. the offender's prior criminal record;
d. the offender's institutional record (disciplinary and rehabilitative); and,
e. the Parole Board Guidelines applicable to the inmate's case.

6. Each inmate is permitted to respond to the factual information provided at the hearing and submit any additional information either verbally or in writing, that the inmate feels is pertinent to the decision making process. The inmate's responses are noted on the release candidate evaluation sheet or information update sheet.

7. Confidential information shall not be released to the inmate, however inmates are informed if confidential information was considered. Confidential information includes:

a. Responses from judges, prosecutors, victims and victim representatives;
b. Information noted in official records as confidential or obtained under promise of anonymity;
c. The pre-sentence investigation and recommendation as directed by Section 2951.03 of the Ohio Revised Code;
d. Any information which could result in physical harm to any person or diagnostic opinions which, if disclosed, could seriously disrupt rehabilitative

programs, or any information deemed confidential by the hearing panel.

8. During the release consideration hearing or interview, the Parole Board hearing officer:

a. verifies the inmate's eligibility for release consideration;
b. interviews the inmate, notes the inmate's responses and prepares a recommendation for the designated Parole Board member, when appropriate;
c. provides advice and technical expertise regarding procedural issues; and,
d. records the major issues discussed and the final decision made at the hearing.

9. During the release consideration hearing or following a release consideration interview conducted by a hearing officer, the Parole Board member reviews the available information concerning the inmate's background, the Parole Board guideline applicable to the inmate's case and the hearing officer's recommendation to determine whether to recommend to the Parole Board the release of the inmate to the community. In a release consideration hearing every effort will be made to reach consensus between the hearing officer recommendation and the Parole Board member's determination. Where consensus cannot be reached the Parole Board member shall seek advice from other Board Members or Hearing Officers present prior to making the determination or refer the case for consideration by the Full Board.

D. DECISION MAKING

1. Prior to making any release or denial recommendation or decision, hearing officers and Parole Board members:

a. Will consider those factors specified in Administrative Regulation 5120:1-1-09;
b. May consider those factors specified in Administrative Regulation 5120:1-1-08; and,
c. Shall review and consider the inmate's Parole Board Guidelines;

2. The Parole Board will give special attention to certain offenders and to certain offense categories to ensure public safety and public confidence in the release process.

a. If a Parole Board member is considering recommending the release of an inmate who is serving a sentence for Aggravated Murder, Murder, Rape or Felonious Sexual Penetration or where the inmate's case is of high notoriety or in any case where the Parole Board members's recommendation is to deny release and continue further consideration of release beyond five years, the Parole Board member shall refer such inmate's case for a Full Board Hearing. This does not limit the discretion of a Parole Board member to refer any case to a Full Board Hearing.

b. In any case where the offense(s) for which the inmate has been committed to the institution resulted in serious physical harm to the victim or where the inmate's history or demeanor reflect that the inmate is chronically mentally ill, the inmate's record shall include a current mental health assessment (MHA) if release is being seriously considered. The MHA must be completed by a licensed for independent practice health care professional, e.g., psychologist,

psychiatrist, social worker, counselor, psychiatric nurse or chemical dependency counselor. For purposes of this procedure a current report is one written within the past two years. No recommendation or decision favorable to release shall be made until such current report is requested and made available for review.

c. Programs within the institutions which help inmates to identify problem areas, deficiencies, compulsions, or addictions and which provide inmates alternatives to negative behaviors are important. Inmates in denial or those refusing to participate in programs designed to reduce or alleviate further criminal behavior shall not be given favorable consideration for release if, in the opinion of the Parole Board Member(s) deciding their case, the inmate continues to present an unacceptable risk of violent and assaultive conduct.

3. The Parole Board should not accept the presence of a detainer as an automatic bar to parole, nor should the Board deny access for parole consideration to an offender who is a foreign national.

4. The decision will be provided to the inmate, both verbally and in writing on the Parole Board Action form immediately following the hearing. Written reasons must be given for decisions that are contrary to the Parole Board Guidelines. Decisions on hearings requiring further review should be made available within 21 calendar days.

5. When release is denied, the Parole Board will inform the inmate in writing of the month and year of his or her next release consideration as well as the reasons for denying release. Inmates denied release will be informed of the process for reconsideration.

6. Once a decision has been finalized, notification of the decision shall be provided to victims and/or victim representatives.

7. Parole Board minutes are considered public information once signed by a majority of Parole Board members.

ODRC Policy 501-38 (1994)

IV. DEFINITIONS

A. RECONSIDERATION: As used in this policy, "reconsideration" shall be the providing of information that was not known or considered by the Parole Board in a preceding hearing which the provider believes should be considered and that if considered could have an effect on the decision rendered.

B. OHIO PAROLE BOARD: The legally constituted authority established pursuant to Section 5149.10 of the Ohio Revised Code including the duly appointed or assigned Hearing Officers and support staff.

C. HEARING: Any release consideration for an eligible inmate's case conducted by a hearing panel or as an interview by a hearing officer with a recommended action forwarded to a Parole Board member for final determination.

D. RULE INFRACTION: A violation of the inmate rules of conduct established for the institutions.

E. SPECIAL CONDITIONS OF RELEASE: Rules of supervision additional to the standard conditions of release as established by the Ohio Parole Board or the Parole Supervision Section of the Adult Parole Authority.

F. PAROLE BOARD RISK ASSESSMENT/ AGGREGATE SCORE: A component of the Parole Board Guidelines system that evaluates an offender's potential risk to re-offend based upon documented historical items. Both the Risk Assessment and Guidelines are suggestive tools utilized by the Parole Board to enhance the quality of decisions. They do not mandate decisions and are not intended to create an expectation of release.

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VI. PROCEDURE

The Ohio Parole Board makes every effort to receive relevant information, concerns and personal opinions concerning each inmate's case prior to or during the hearing. Information is sought through statutory notification of release consideration hearings to judges, prosecutors and victims and the Parole Board's policies of hearing notification to inmates and making itself accessible to the public through personal interviews.

Regardless of these efforts, there are cases where relevant information is not known or available prior to a release decision being made or cases where the inmate's behavior subsequent to a release decision has direct bearing on the decision. In these cases, the Ohio Parole Board will accept the new information and process a reconsideration of the previously rendered decision.

A. A request for reconsideration of any release decision must be submitted in writing to the Ohio Parole Board within sixty (60) days of the date of the release consideration hearing. There is no specific form or format for this process.

B. The request for reconsideration must specify information that was either not available or not considered at the time of the hearing.

C. Upon receipt of a request for reconsideration, the Parole Board shall process the request and file material relating to the hearing and deliver this material to the Parole Board Chair or designee.

D. Inmates alleging an error in their Risk Assessment/Aggregate Score and subsequent guideline determination shall first discuss the suspected error with their Unit Manager or Case Manager. If the Unit Manager believes an error has been made, the circumstances are to be referred to the institution's Director of Social Services. If the Director of Social Services agrees that an error has been made, (s)he shall forward a letter or memorandum outlining the alleged error to the Chief Hearing Officer or the Parole Board. The Chief Hearing Officer or designee will make the final determination regarding the alleged error. If an error is found that does not affect the guideline utilized by the Parole Board, a corrected Risk Assessment will be forwarded to the inmate through the Director of Social Services. If an error is found affecting the guideline, the corrected Risk Assessment and a memorandum outlining the error(s) shall be forwarded to the Parole Board Chair for processing as a reconsideration pursuant to the subsequent sections of this policy.

E. The Parole Board Chair or designee shall determine whether or not the request for reconsideration provides information not known or considered at the hearing and whether the information, if considered, would affect the previous decision rendered.

F. If the determination is that the request for reconsideration is not well founded, the Parole Board staff

shall prepare a written response advising the provider that the request is denied and that the Parole Board's decision stands.

G. If the determination is that the request for reconsideration is well founded, the Parole Board Chair or designee shall initiate a modification sheet requesting:

1. The previous decision be modified to reflect an action commensurate with the request for reconsideration, or;

2. The previous decision be rescinded and recommend an alternative action, or;

3. The previous decision be rescinded and that the case be scheduled for rehearing.

The modification request as provided in paragraph G shall be submitted to all remaining Board Members for final approval. Final approval requires the concurrence of at least a majority of all Board Members. Failure to receive final approval negates the modification request and affirms the original decision.

In any case where the request for reconsideration involves the institution administrators advising the Parole Board of subsequent institution rule violations or in any case where the request information would clearly affect the previous decision rendered, the Parole Board Chair may direct a special minute to rescind the previous action and order a rehearing of the case. Such special minutes must be submitted to the remaining Parole Board Members for concurrence by at least a majority.

Inmates requesting reconsideration of an unfavorable release consideration decision based on disparate treatment

must provide names and institution numbers of inmates upon whose action the appeal is based.

K. Victims requesting reconsideration must provide the information to the Victim Notification Section or the Parole Board in writing or in person. The Parole Board Chair may direct a special minute to rescind the previous action and orde· a rehearing of the case. Such special minutes must be submitted to the remaining Parole Board Members for concurrence by at least a majority.

L. - In any case where the original release consideration is to release the offender and the request for reconsideration is filed timely. the Parole Board Chair or designee may stop the physical release of the inmate pending determination of the request by informing the institution record office. the Parole Supervision Placement Section and the inmate in writing.